UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

VOICES FOR INTERNATIONAL BUSINESS AND EDUCATION, INC. D/B/A INTERNATIONAL HIGH SCHOOL OF NEW ORLEANS

Employer

and **Case 15-RC-175505**

UNITED TEACHERS OF NEW ORLEANS, LOCAL 527, LFT, AFT

Petitioner

UNION'S OPPOSITION TO COMPANY'S REQUEST FOR REVIEW

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I. INTRODUCTION

After the United Teachers of New Orleans, Local 527, LFT, AFT (Petitioner or Union) filed its Petition under Section 9(c) of the National Labor Relations Act (NLRA or Act), as amended, a National Labor Relations Board (Board) Hearing Officer held a hearing on May 13, 2016 in New Orleans, Louisiana. The only issue was whether the Board has jurisdiction over Voices for International Business and Education, Inc. D/B/A International High School of New Orleans (Employer or International), the operator of a charter public school.

The Employer asserted that the Board does not have jurisdiction over it because Section 2(2) of the Act exempts from the Board's jurisdiction any "State or political subdivision thereof" and that it is a political subdivision of the State of Louisiana. But the Regional Director concluded that the Employer was not a political subdivision of the State but, rather, a private non-profit corporation subject to the Board's jurisdiction.

The Employer now requests a review of the Regional Director's May 19, 2016 decision and direction of election, arguing that the National Labor Relations Board (NLRB or Board) does not have jurisdiction. The Employer gives the following "compelling" reasons for its

request: (1) a substantial question of law or policy is raised because there is an absence of reported Board precedent concerning the substantial question of whether all charter schools are political subdivision of the state, and (2) there are compelling reasons for reconsideration of the Board's rule or policy. The Employer makes two arguments in support of its position that the Board lacks jurisdiction: (1) that the Employer is a political subdivision under the *Hawkins* test, and (2) that the Board decision in *Chicago Mathematics & Science Academy Charter School, Inc.,* 359 NLRB No. 41 (2012) should not apply to International. The Employer argues alternatively that even if the Board has jurisdiction, it should exercise its discretion to decline to assert it.

II. FACTS

In 2009, the Employer began operating the International Charter School, under a contract with the Louisiana Board of Elementary and Secondary Education (BESE). International consists of grades nine through twelve on a campus in the City of New Orleans, State of Louisiana. On May 4, 2016, the Union filed the petition to represent certain employees of the Employer.

A. Louisiana's Charter Law does not provide for appointing or removing charter board members.

In 1997, the Louisiana Legislature passed the Louisiana Charter School Demonstration Programs Law, La. R.S. 17:3971, *et seq.* (Charter School Law) to allow local school authorities to enter into contracts with nonprofit corporations to operate public schools.[1] Section 3972 (A) of the Charter School Law states:

[1] *See* La. R.S. 17:3983(A)(1) ("Any of the following may form a nonprofit corporation for the purpose of proposing a charter as provided in this Subsection. "); La. R.S. 17:3983(A)(4)(a) ("A local school board and a local charter authorizer may enter into any charter it finds valid, complete, financially well-structured, and educationally sound."); La. R.S. 17:3972(B)(1) ("The purposes of this Chapter shall be to provide opportunities for educators and others interested in educating pupils to form, operate, or be employed within a charter school with each such school designed to accomplish one or more of the following objectives. ")

> It is the intention of the legislature in enacting this Chapter to authorize experimentation by city and parish school boards by authorizing the creation of innovative kinds of independent public schools for pupils. Further, it is the intention of the legislature to provide a framework for such experimentation by the creation of such schools, a means for all persons with valid ideas and motivation to participate in the experiment, and a mechanism by which experiment results can be analyzed, the positive results repeated or replicated, if appropriate, and the negative results identified and eliminated. Finally, it is the intention of the legislature that the best interests of at-risk pupils shall be the overriding consideration in implementing the provisions of this Chapter.

Section 3991(A)(1)(a) of the Charter School Law mandates[2] that, the operator of a charter school be "organized as a nonprofit corporation under applicable state and federal laws." Subsection (A)(2) states:

> Consistent with the provisions of this Chapter, a charter school and its officers and employees may exercise any power and perform any function necessary, requisite, or proper for the management of the charter school not denied by its charter, the provisions of this Chapter, or other laws applicable to the charter school.

Notably, however, the Charter School Law contains no provisions for appointing or removing board members.

The Charter School Law has been implemented by Bulletin 126, which was promulgated by the BESE pursuant to its authority under La. R.S. 17:6(A)(10) and R.S. 17:3981. The Bulletin is codified at Louisiana Administrative Code, Title 28, Part CXXXIX, § 101, La. Admin. Code tit. 28, pt. CXXXIX, § 101 (hereinafter Charter Bulletin 126). Charter Bulletin 126, § 2103 clearly provides that the "board of directors of each charter operator shall be responsible for implementing the public school charter program proposed in its charter application, complying with and carrying out the provisions of the charter school contract and complying with all applicable federal and state laws and policies governing the charter school." § 2103(A). A charter operator's board of directors "shall comply with all requirements set forth

[2] There is one exception not applicable here.

by the Louisiana Nonprofit Corporations Law and Louisiana Secretary of State and shall remain in good standing during the term of its charter." § 2103(C).

The Charter School Law and Charter Bulletin 126 clearly establish and require the Employer's status as a private contractor. Indeed, § 2103(F) mandates that the "board of directors of each charter operator shall exercise final authority in matters affecting the charter school including, but not limited to, staffing, financial accountability, and curriculum." (Emphasis added). Section 2901(C) of Charter Bulletin 126 specifically provides that a "charter operator shall have exclusive authority over all employment decisions in the charter school . . . . "

B. The Employer's Articles of Incorporation provide for its board members to appoint and remove other board members.

On August 7, 2009, Articles of Incorporation were filed with the Louisiana Secretary of State creating the Employer as a Louisiana nonprofit corporation (Employer Exhibit 4). Article V (Board of Directors), states that the board members are responsible for the overall policy and direction of the school and shall "delegate responsibility for day-to-day operations" to the head of school and International committees. All Board members "will approve by majority vote, new members, officers and committee chairs." None of the original members of the International board of directors was appointed by the State nor by BESE; they appear to be all private individuals. Employer Exhibit C. According to International's by-laws, a board member "may be removed with or without cause by a three-fourths vote of the remaining" board members, and a board member shall be removed if he has three unexcused absences during the year. Employer Exhibit D, pp. 3-4. All corporate powers are vested in and exercised by the board of directors. Employer Exhibit D, p. 3.

C. The Charter Agreement establishes International as a corporation contracting with BESE.

Employer Exhibit 1, the most recent charter agreement between International and BESE was signed on August 19, 2015, and March 5, 2015, respectively. International is a "Type 2" charter meaning that it is

> a pre-existing public school converted and operated as a result of and pursuant to a charter between the non-profit corporation created to operate the school and the state Board of Elementary and Secondary Education.

Charter Bulletin Section 107 (C). International Exhibit B.

Section 1.1.5 requires the Employer to maintain itself as a nonprofit corporation. Section 2.2.7 states that the International and its Board of Directors "shall be the final authority in matters affecting the charter school, including, but not limited to, staffing, financial accountability, and curriculum, except as otherwise provided in this contract and as provided by applicable law and by policies promulgated by BESE." International's Exhibit A, p. 6. Section 5.3 provides the terms on which BESE may revoke the terms of the contract, including a material violation of the contract or failure to meet generally accepted accounting standards. Section 4.1.1 states that the charter operator (International board members) shall employ necessary personnel, and that the employees will not be employees of BESE. Exhibit G to the charter states that the Employer will not follow any collective bargaining agreement entered into by the local school district where the charter is located. Exhibit H states that the Employer will not participate in the Teachers' Retirement System of Louisiana nor the Louisiana School Employees' Retirement System.

III. ARGUMENT

The United States Congress excluded government entities from the NLRB jurisdiction. Section 2(2) of the Act excludes from the definition of employer "the United States or any

wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." An entity may be considered a "political subdivision" if it meets *either* of two standards: 1) it was created directly by the State so as to constitute a department or administrative arm of the government; or 2) it is administered by individuals who are responsible to public officials or to the general electorate. *NLRB v. Natural Gas Utility District of Hawkins County,* 402 US 600, 604-05 (1971). In *Hawkins County*, 402 U.S. at 604-06, the Supreme Court held that a natural gas utility district organized under Tennessee law was a political subdivision of the state and thus not an employer under the NLRA. It so held based on the following facts: the district had imminent domain powers, was statutorily declared to be a municipality, and its officers/commissioners were appointed by a county judge and subject to removal under Tennessee's general ouster law. The removal of the commissioners could be initiated by the governor, state attorney general, the county prosecutor or ten citizens.

The Board has held that Section 2(2) exempts "only government entities or wholly owned government corporations from its coverage —not private entities acting as contractors for the government." *Research Foundation of the City University of New York*, 337 NLRB 965, 968 (2002) (*quoting Aramark Corp. v. NLRB*, 179 F.3d 872, 878 (10th Cir. 1999)). Here, the Employer satisfies neither prong under *Hawkins,* but is instead a private contractor.

A. International was not created by the State of Louisiana.

In the current matter, the Employer was created by the individuals who incorporated it in 2009, not by the State. The Employer was created when its Articles of Incorporation were filed with the Louisiana Secretary of State. It was then granted a "Type 2" charter by BESE. La. R.S.

17:3973(2)(b)(ii). The charter agreement was renewed on August 19, 2015. But its continued existence as a legal entity depends on its adherence to the corporation laws of the State of Louisiana and the willingness of its private citizen board. Even if the Employer ceased operating the International Charter School, or if the Charter School Law were repealed, the Employer would continue existing as a legal entity until its board authorized its dissolution. International does not actually argue that it was created by the state so as to constitute a department or an administrative arm. Rather it argues that it is analogous to other political subdivisions such as school boards and that it has to answer to BESE and to the Recovery School District.

The Board quite routinely asserts jurisdiction over private employers —like International—who contract with government entities to provide certain types of services. In *Research Foundation, supra*, the employer was a private, non-profit corporation that had a contract with the City University of New York (CUNY), a public university. The Board found, *inter alia*, that the employer was not an exempt political subdivision where the employer, as here, was administered by its own board of directors, whose appointment and removal were governed by the employer's own by-laws, not by any law or statutory provisions. In *Connecticut State Conference Board, Amalgamated Transit Union,* 339 NLRB 760 (2003), jurisdiction was asserted over a private employer that had a contract with the State of Connecticut to provide public bus service, where the employer's managers were not responsible to public officials or the general electorate. In *Enrichment Services Program,* 325 NLRB 818 (1998), the Board found that a private employer was not an exempt political subdivision where less than a majority of the members of its board of directors were public officials or individuals responsible to the general electorate.

Similarly here, the Employer was not created directly by the State but by private individuals. The Board finds that entities created by an act of legislation to have been created directly by the State. The Board has even found that entities created by an act of the judiciary to have been created directly by the State. *State Bar of New Mexico,* 346 NLRB 862 (1990) (New Mexico's Supreme Court enactment of rule creating state bar association amounted to direct creation by State). However, entities created by private individuals are not "created directly by" the State, even if they are created with the collaboration of the State to serve a public function on behalf of the State. For example, in *Regional Medical Center at Memphis,* 343 NLRB 346 (2004), the Board found the entity operating the county's public hospital to have been created by private individuals and not created by the county. In that case, after private individuals created a non-profit corporation to operate the hospital, the county dissolved the county hospital authority and executed a contract with the non-profit corporation to operate the hospital. Because the non-profit corporation was created by individuals, the Board found it was not created directly by the county. *Id.* at 358.

In *Chicago Mathematics,* 359 NLRB No. 41, slip op. p. 6 (2012), the Board found that the operator of a Chicago charter public school was not created directly by the state but, rather, by the individuals who created the non-profit corporation that operated the school. In that case, as here, it was argued that the State of Illinois created the entity through the enactment of a charter schools law, which allowed the existence of charter schools. However, the Board found that the statute simply permitted local school authorities to enter into contracts with private entities to administer public schools and that the entities were created by the individuals who incorporated them. Thus, the Board found the entity administering the charter school was not created directly by the State.

In *Pennsylvania Cyber Charter*, Case 06-RC-120811, 2014 WL 1390806 (4/9/14), the Board rejected the notion that Cyber Charter had been created directly by the state, finding instead that it was created by private individuals who formed a non-profit corporation. The Board found persuasive the facts that no local or state official was involved in the selection or removal of any members of Cyber Charter's governing board, or in the hiring of Cyber Charter's staff, including its CEO.

Most recently, in *Evergreen Charter School*, 29-RD-175250 (May 27, 2016), the Regional Director for Region 29 decided that a charter school was a government contractor and an employer over which the Board had jurisdiction. It found that the individual applicants, not the state board of regents had directly created the school. Moreover, the governance and control were vested solely in private incorporators, not in public entities. Like Evergreen, International was not created directly by the State.

B. *Chicago Mathematics* applies directly to International.

International seems to interpret the Regional Director's decision as applying *Chicago Mathematics* as a "bright line rule" about charter schools rather than applying the legal principles of that case to the International facts, which is what she did. Indeed, as International points out, the Board cautioned that it was not establishing a bright-line rule about the Board's jurisdiction over entities that operate charter schools. Nevertheless, *Chicago Mathematics* cannot be ignored, and the legal principles in that case lead to the conclusion that International is within the Board's jurisdiction, regardless of how International spins the facts. International points out that *Chicago Mathematics* relied heavily on the fact that appointment and removal of a majority of its governing board members were controlled by private rather than public individuals. International asks the Board not to apply this principle as a bright line rule. But this was an

equally decisive factor for the Supreme Court in *Hawkins* whose officers/commissioners were appointed by a county judge and subject to removal initiated by the governor, the state attorney general, the county prosecutor or ten citizens. Not so, International, whose board members are subject to removal only by the other privately appointed board members.

C. International is not administered by anyone responsible to public officials or the general electorate.

In a roundabout way the Employer seems to claim to be administered by the State by saying that it functions as a public school board which is a political subdivision. It argues that it is under the jurisdiction of the Recovery School District (RSD) (La. R.S. 17:1990), another political subdivision; that it is subject to oversight by BESE, the Louisiana Board of Ethics, and the Legislative Auditor; that the composition of its board is dictated by BESE; and its board members are subject to removal by the Board of Ethics or BESE. But these arguments are hollow. Just because the state has contracted out to a private entity some of the functions of a school board does not transform that private entity into a political subdivision. Indeed, Louisiana already has political subdivisions that operate public schools— local school boards, BESE, and now RSD. The whole point of the Charter School Law is to encourage innovation by allowing independent private corporations to run public schools. La. R.S. 17:3972(A). The RSD statute cited by International makes clear that the RSD is a political subdivision, but International is not mentioned, and no statute grants the same authority to International. Further, La. R.S. 17:1990 (B)(2)(a) states that the RSD "may contract with for-profit providers for the general operation of and any needed services for a school under its jurisdiction." When International states that the composition of its board is dictated by BESE it only means that the International board members selected must have certain characteristics, but International points

to no authority that supports that BESE has authority to actually select the board members or remove them.

International points to *Pelican Educational Foundation, Inc. v. Louisiana State Board of Elementary and Secondary Education*, 2011-2067 (La. App. 1st Cir. 6/22/12); 97 So. 3d 440 for the proposition that BESE has authority to revoke the charter from a school. Thus, argues International, its board is subject to removal by BESE. But in *Pelican*, BESE revoked the charter because it found that Pelican had breached its agreement by endangering the health and welfare of its student. There is no evidence that BESE removed any of Pelican's board members; rather it terminated its contract for breach, as could occur with any government contractor.[3] The contract of any government contractor is subject to termination for breach.

In determining whether an entity is administered by "individuals who are responsible to public officials or the general electorate," the Board looks at whether a majority of those individuals are "appointed by or subject to removal by public officials." *Chicago Mathematics,* 359 NLRB No. 41, slip op. pp. 7-8 (2012). In *Chicago Mathematics,* the Board found that all of *Chicago Mathematics*' board's directors, who had complete control over the operations of the charter school, could be appointed and removed only by the board itself. Thus, the individuals administering the school were not responsible to public officials or to the general electorate. The same is true for International.

In the instant case, the Employer is not administered by individuals who are responsible to public officials or the general electorate. *Charter School Administration Services, Inc.*, 353 NLRB 353 (2008); *Research Foundation of the City University of New York,* 337 NLRB 965, 969 (2002); *Hawkins County*, 402 U.S. at 605. "In following *Hawkins County*, the Board has

[3] Hearsay about the Downsville Charter School should not be considered. (See Employer Request for Review p. 16).

continued to consider the relationship between the employer's governing body and the governmental agency to which it is linked. The Board has continued to find it significant if a majority of an employer's board of directors is composed of individuals responsible to public officials or individuals responsible to the general electorate." *Regional Medical Center at Memphis,* 343 NLRB 346, 359 (2004). The "courts and the Board generally consider whether a majority of the employer's governing body – the governing board and executive officers – is appointed by or subject to removal by public officials." *Aramark Corp. v. NLRB*, 156 F.3d 1087, 1093 (10th Cir. 1998), *vacated in part on rehearing en banc*, 176 F.3d 872 (10th Cir. 1999). The Board's approach is very discrete. It looks to whether the composition, selection and removal of the employer's board of directors are determined by law or by the employer's own governing documents. *Research Foundation*, 337 NLRB at 969. In *Pennsylvania Cyber Charter*, Case 06-RC-120811, 2014 WL 1390806 (4/9/14), neither Cyber Charter's trustees nor its CEO were directly or personally accountable to any state or local public officials or to the general electorate. The fact that Cyber Charter received public funds to carry out public contracts did not make it an administrative arm of government.

Similarly, under the terms of the Employer's Articles of Incorporation, board members are selected and removed by current members (the initial members were named in the Articles of Incorporation). Employer Exhibit C, p. 2, Art. III & Art. V. Additionally, there is no evidence that a board member has ever been appointed and/or removed by a public official or the general electorate. Thus, it cannot be said that any of the Employer's board members are responsible to public officials or the general electorate.

Further, except for setting standards and guidelines, both the Charter School Law and the Employer's charter grant the Employer's board complete control over the operations of the

school, including hiring and firing. Consequently, none of the individuals who have control over the administration of the school may be removed by public officials or the general electorate. Therefore, the Employer is not administered by individuals who are responsible to public officials or the general electorate.

Federal rather than state law governs the determination of whether an entity was a political subdivision. *Hawkins County*, 402 U.S. at 604-06. However, the state's characterization of an entity is an important factor in determining whether an employer was created so as to constitute a department or administrative arm of government. *Hinds County Human Resource Agency,* 331 NLRB 1404 (2000). The Louisiana Attorney General has opined that a Type 2 charter school, an independent public school that is operated pursuant to a charter between a nonprofit corporation and the Board of Elementary and Secondary Education, is not a political subdivision of the state. La. A.G. Op. 04-0317 (2004), 2004 WL 2843115.[4]

The conclusion that International is not a political subdivision is also consistent with a federal court decision applying a different statute. The United States District Court for the Eastern District of Louisiana, recently held that another New Orleans, Louisiana charter was free to bring a suit against the Orleans Parish School Board under 42 U.S.C. §1983 because it was not a political subdivision of the State nor a State actor (*Advocates for Art-Based Education Corp. v. OPSB*, No. 09-6607 (E.D. La. 1/26/10), 2010 WL 357223. The court there concluded: "The fact that the charter school performs a governmental function does not make it a political subdivision of the state." And, "under Louisiana law, [the charter] is not a political subdivision of the state . . . . "

[4] *See also Louisiana High School Athletics Assoc., Inc. v. State of Louisiana*, 2012-1471*33 (La. 1/29/13) 107 So.3d 583, 607 (LHSAA, a Louisiana nonprofit corporation, was not a public body despite being partially funded by public money earned by state schools under their control at their athletic events and having a connexity with a public body).

D. The Board should exercise jurisdiction.

The Employer's last argument is that even if the Board has jurisdiction, it should exercise its discretion not to assert jurisdiction, citing *Temple University*, 194 NLRB No. 195 (1972) and *Jefferson Downs, Inc.*, 125 NLRB 386 (1959), in support of its position. But there are no similarities. Under 29 U.S.C. §164 (c)(1):

> The Board, in its discretion, may, by rule of decision or by published rules . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

The Board declined to assert jurisdiction over Temple University because, although it was a private, nonprofit corporation, it had a unique relationship with the Commonwealth such that the University was denominated in legislation as an "instrumentality" of the Commonwealth and made a "State-related university in the higher education system of the Commonwealth"; Commonwealth involvement in the financial affairs of the University had become substantial, if not controlling; the Commonwealth had extensive, direct control over University activities; and one-third of the members of its board of trustees were appointed by the Commonwealth.

In *Northwestern Univ. and College Athletes Players Ass'n*, 362 NLRB No. 167 (2015) (*CAPA*), the Board concluded that it would not effectuate the policies of the Act to assert jurisdiction in that case, even assuming that grant-in-aid scholarship players were employees within the meaning of Section 2(3) because it would not serve to promote stability in labor relations. The Board emphasized the novel and unique circumstances of the case; the fact that it had never before been asked to assert jurisdiction in a case involving college football players, or college athletes of any kind; and that the scholarship players did not fit into any analytical framework that the Board had used in cases involving other types of students or athletes such as

graduate student assistants, student janitors, or cafeteria workers whose employee status the Board had considered in other cases.

The Employer strains to construct a comparison by citing state laws that it must comply with and its reporting obligations to BESE. Section 2.2.7 of its own Charter Agreement states that International and its Board of Directors "shall be the final authority in matters affecting the charter school, including, but not limited to, staffing, financial accountability, and curriculum, except as otherwise provided in this contract and as provided by applicable law and by policies promulgated by BESE." International's Exhibit A, p. 6. International's board is not required to include any elected officials or persons appointed by any governing authority. Employer Exhibit C.

In *Jefferson Downs, Inc.*, 125 NLRB 386 (1959) and similar cases cited by the Employer, the Board has declined to assert jurisdiction over racetrack operations which are essentially local in nature and subject to extensive state regulation. However, the Board in *Chicago Mathematics*, rejected these comparisons to a charter school. It noted that Chicago Mathematics—like International —had no members of its board politically or publicly appointed. Moreover, the unique circumstances of the dog and horseracing industries, especially their pattern of short-term employment, distinguishes them from the charter school setting.

IV. CONCLUSION

Under clear Board law, the Employer fails to satisfy either prong of *Hawkins County.* It is not exempt from the Board's jurisdiction. Nor is there any rationale for the Board to exercise its discretion to decline to assert jurisdiction. International is an "employer" within the meaning of Section 2(2) of the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2016, I electronically filed the above and foregoing with the National Labor Relations Board E-filing system, and a copy was served on counsel by E-mail and/or facsimile transmission:

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